

FEB 28 2007

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:	:	
	:	
HOSPITALITY VENTURES/LAVISTA,	:	Case No. 01-88200
a Georgia General Partnership	:	
	:	Chapter 11 - Judge Bonapfel
	:	
Debtor.	:	
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HOSPITALITY VENTURES/LAVISTA,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Adversary No. 03-6596
	:	
HEARTWOOD 11, L.L.C., VESTA HOLDINGS I,	:	
L.L.C., and VESTA HOLDINGS, INC.,	:	
	:	
Defendants and	:	
Third-Party Plaintiffs,	:	
	:	
vs.	:	
	:	
DEKALB COUNTY, GEORGIA, and CLAUDIA	:	
G. LAWSON in her official capacity as Tax	:	
Commissioner of DeKalb County,	:	
	:	
Third -Party Defendants.	:	
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PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The third-party claim of Vesta Holdings I, LLC, as nominee for Heartwood 11, LLC (formerly known as Heartwood 11, Inc.) ("Heartwood") against DeKalb County¹ in this

¹The third-party complaint was filed against DeKalb County and Tom Scott, in his official capacity as Tax Commissioner of DeKalb County. The County parties identify themselves as the DeKalb County Board of Tax Assessors and the DeKalb County Tax Commissioner. The nomenclature appears to be immaterial, as none of the parties has addressed the issue, and the Court, like the parties, will refer to the third-party defendant as DeKalb County. During the pendency of this proceeding, Mr. Scott died. Pursuant to a Consent Order

adversary proceeding is not a “core proceeding” within the meaning of 28 U.S.C. § 157(b)(2). Having heard the third-party claim as summarized below, the Court hereby submits its proposed findings of fact and conclusions of law in accordance with 28 U.S.C. § 157(c)(1) and FED. R. BANKR. P. 9033(a) for consideration and de novo review by the District Court.

I. PROCEDURAL BACKGROUND

The Debtor was (and remains) the owner of a hotel in DeKalb County, Georgia. DeKalb County assessed the value of the hotel as \$ 6,178,700 for purposes of 1998 ad valorem taxes, resulting in a tax obligation of \$ 93,075.92. The Debtor did not timely contest the 1998 assessment or pay the tax, and the County issued a tax fi. fa. for \$97,750.22. Vesta Holdings I, LLC, as nominee for Heartwood 11, LLC (formerly known as Heartwood 11, Inc.) (“Heartwood”) purchased the tax fi. fa. on March 18, 1999, by paying the County \$100,549, the amount then due thereon, pursuant to now repealed O.C.G.A. § 48-3-19.²

On December 3, 2001, the Debtor filed its chapter 11 petition. On November 12, 2003, the Debtor filed this adversary proceeding against Heartwood [1]. Debtor’s complaint sought a reduction of the tax claim under former § 505(a) of the Bankruptcy Code, as applicable in this proceeding prior to its amendment by the Bankruptcy Abuse Prevention and Consumer

entered on February 16, 2007 [159], Claudia G. Lawson has been substituted as a party defendant for Mr. Scott.

²Former O.C.G.A. § 48-3-19(a)(1) provided in pertinent part:

Whenever any person other than the person against whom an execution has been issued pays an execution issued for state, county, or municipal taxes and proves compliance with subsection (b) of this Code section for individual transfers or subsection (c) of this Code section for transfers in lot blocks, the officer whose duty it is to enforce the execution, upon request of the party paying the execution, shall transfer the execution to the party so paying.

Protection Act of 2005. Former § 505(a) provides that a bankruptcy court “may determine the amount or legality of any tax . . . whether or not previously assessed.”³ The complaint alleged that the hotel should have been assessed with a value of \$1,466,897 for 1998 and the Debtor’s tax liability for that year reduced accordingly.

Heartwood answered and filed a third-party complaint against DeKalb County, seeking relief from the County if Heartwood suffered a loss because its claim was allowed for less than what it paid the County [6, 7].

The parties filed several pretrial motions. The Debtor filed a motion to dismiss the third-party complaint against DeKalb County for lack of subject matter jurisdiction and all of the parties filed motions for summary judgment. For reasons announced on the record at a hearing held on September 20, 2005, and summarized in the Court’s Order entered on October 13, 2005 [105], the Court denied the Debtor’s motion to dismiss and its motion for summary judgment and deferred ruling on the motions for summary judgment filed by Heartwood and DeKalb County with regard to the third-party complaint, pending determination of the value of the hotel at trial in connection with resolution of the Debtor’s complaint against Heartwood.

Prior to the trial, scheduled for October 27, 2005, the Debtor and Heartwood agreed to a compromise [106]. Among other things, the Debtor and Heartwood stipulated that the fair market value of the hotel in 1998 for ad valorem tax purposes was \$2,500,000. This valuation resulted in allowance of the tax claim for \$59,853.07 less than the amount of the tax as determined by DeKalb County and that Heartwood had paid. This compromise, approved

³As amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, section 505(a) no longer permits such challenges to ad valorem taxes. References herein are to the statute prior to its amendment.

without objection from DeKalb County, resolved the issues in this proceeding as between the Debtor and Heartwood. Based on the stipulation and the record as developed in connection with Heartwood and DeKalb County's motions for summary judgment and at the trial on the issue of the value of the hotel at which DeKalb County announced that it had no evidence of value to present, the Court determined in an order entered on January 10, 2006 [116],⁴ that DeKalb County was liable to Heartwood for this difference and entered judgment [117] in Heartwood's favor.

On DeKalb County's timely appeal, the District Court vacated the Court's judgment and remanded. The District Court ruled that this Court had not made a true factual finding of the hotel's value and remanded for this Court to "conduct a hearing and make a proper factual determination" regarding its value. (D.Ct. Order at 9). The District Court also questioned the existence of subject matter jurisdiction of the third-party claim and directed this Court to "re-assess whether it has subject matter jurisdiction over this dispute" before proceeding with the factual determination. (*Id.* at 9-10).

The Court entered two Opinions on January 4, 2007, in response to the District Court's directions. First, the Court entered its "Opinion on Remand with Regard to Jurisdiction and Referral of Third-party Claim Against DeKalb County" (the "Jurisdiction Opinion") [145]. In the Jurisdiction Opinion, the Court determined that the District Court has subject-matter jurisdiction of the third-party claim under the provisions of 28 U.S.C. § 1334(b), as supplemented by 28 U.S.C. § 1367; that the third-party claim is properly referable to the

⁴At trial, DeKalb County vigorously asserted a number of procedural and substantive defenses. Because DeKalb County's arguments did not include lack of subject matter jurisdiction, the Court did not address this issue in its January 10, 2006, Order.

bankruptcy judges of this District under 28 U.S.C. § 157(a) and LR 87.3, NDGa, to hear as a non-core proceeding under 28 U.S.C. § 157(c); and that it is appropriate that jurisdiction not be declined under 28 U.S.C. § 1367(c).

Second, the Court entered its “Order Vacating January 10, 2006 Order; Opinion on Motions for Summary Judgment Relating to Issues in Third Party Complaint; and Order and Notice of Trial” (the “Summary Judgment Opinion”) [146]. The Summary Judgment Opinion dealt with several matters in view of the Court’s determination of the jurisdictional issue. First, although the District Court did not expressly vacate this Court’s January 10, 2006, Order, this Court did vacate it to correct its error in entering findings of fact and conclusions of law under Rule 52(a) with regard to the non-core dispute between Heartwood and DeKalb County contrary to the provisions of 28 U.S.C. § 157(c). Second, the Opinion determined that Heartwood’s Motion for Partial Summary Judgment [65] should be granted and that DeKalb County’s Motion for Summary Judgment [91] should be denied. In view of this determination, the Court scheduled a trial for February 15, 2007, on the remaining issues – the value of the hotel and the amount of tax based on that value. Both opinions deferred the submission of these determinations as the proposed findings of fact and conclusions of law required by 28 U.S.C. § 157(c)(1) and FED. R. BANKR. P. 9033 until their incorporation into proposed findings of fact and conclusions of law to be submitted with regard to all issues at the conclusion of the trial.

The Court denied DeKalb County’s motion for reconsideration [149] by Order entered on February 8, 2007 [154]. On the day before the trial, DeKalb County filed objections to the trial [157] that restated legal defenses the Court had previously rejected. At the commencement of the trial, the Court overruled the objections and the trial proceeded. At the close of

Heartwood's evidence, DeKalb County made a motion for judgment as a matter of law under FED. R. CIV. P. 52(c), *applicable under* FED. R. BANKR. P. 7052, which the Court declined to grant.

Heartwood's evidence consisted of a stipulation of facts agreed to by DeKalb County, which was read into evidence and has been docketed in this proceeding [158], and testimony from a real estate appraiser and a principal of the Debtor. The appraiser testified that the hotel was worth \$1,625,000 on January 1, 1998, and the Debtor's principal testified that it was worth between \$1,600,000 and \$2,150,000 on that date. The parties stipulated that Heartwood purchased the 1998 tax fi. fa. from DeKalb County on March 18, 1999, for \$100,549. At the conclusion of the trial, they agreed that \$ 40,695.93 would have been due on the tax fi. fa. on March 18, 1999, if the hotel had been assessed for \$2,500,000. Because, in accordance with the stipulation between the Debtor and Heartwood, the Court has allowed Heartwood's claim for only \$40,695.93, Heartwood paid \$59,853.07 more to DeKalb County than Heartwood will be able to collect in the Debtor's bankruptcy case by operation of the provisions of 11 U.S.C. § 505(a).

DeKalb County did not produce any evidence, asserting that it was not required to do so in view of its legal defenses.

II. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has considered the record in this case as appropriate in connection with the determination of jurisdictional issues and the motions for summary judgment of Heartwood and DeKalb County with regard to Heartwood's third party claim and has heard evidence at the trial conducted on February 15, 2007, with regard to issues that are not resolved by the grant of partial

summary judgment in favor of Heartwood. Based thereon, the Court submits the following proposed findings of fact and conclusions of law for the District Court's consideration and de novo review in accordance with 28 U.S.C. § 157(c)(1) and FED. R. BANKR. P. 9033:

1. For reasons set forth in the Jurisdiction Opinion entered on January 4, 2007 [145] and incorporated herein as conclusions of law, the Court concludes: that the District Court has subject matter jurisdiction of Heartwood's Rule 14 third-party claim under the provisions of 28 U.S.C. § 1334(b), as supplemented by 28 U.S.C. § 1367; that the third-party claim is properly referable to the bankruptcy judges of this District under 28 U.S.C. § 157(a) and LR 87.3, NDGa, to hear as a non-core proceeding under 28 U.S.C. § 157(c); and that it is appropriate that jurisdiction not be declined under 28 U.S.C. § 1367(c).

2. Motions for summary judgment have been filed by Heartwood [65] and by DeKalb County [91]. Heartwood's motion seeks partial summary judgment on the legal issue that, based on a theory of unjust enrichment, it is entitled to recover from DeKalb County the difference in what it paid for the tax claim and the amount allowed as determined pursuant to § 505(a). DeKalb County in its motion asserts that Heartwood is not entitled to recover against DeKalb County as a matter of law on several grounds. At the October 27, 2005 trial, DeKalb County raised other legal defenses. DeKalb County renewed various legal defenses in its Objections filed on February 14, 2007 and in its Rule 52(c) motion for judgment as a matter of law at the close of Heartwood's evidence at the trial on February 15, 2007. The Court has addressed the legal issues raised by the parties and explained its reasoning with regard thereto at length in the Summary Judgment Opinion [146] entered on January 4, 2007. For reasons set forth in the Summary Judgment Opinion and in the "Order On Motion For Reconsideration" [154] entered

on February 8, 2007, as supplemented by the Court's rulings announced on the record at the trial, all incorporated herein as conclusions of law, the Court concludes that Heartwood is entitled to partial summary judgment, that DeKalb County is not entitled to summary judgment, and that DeKalb County is not entitled to judgment as a matter of law in this proceeding under FED. R. Civ. P. 52(c). In this regard, the Court concludes that Heartwood is entitled to recover from DeKalb County based on the principle of unjust enrichment and that none of DeKalb County's arguments asserted in its motions for summary judgment, at the October 27, 2005 trial, in its Objections filed on February 14, 2007, or at the trial on February 15, 2007, provides a legal defense to Heartwood's claim. Consequently, Heartwood is entitled to judgment against DeKalb County to the extent that the amount Heartwood paid DeKalb County for the tax claim exceeds the amount that would have been due by calculating the tax, penalties, and interest based on a valuation of the hotel on January 1, 1998, at the greater of \$2,500,000 (its stipulated value as between the Debtor and Heartwood from which the amount of Heartwood's allowed claim has been calculated) or the properly determined value of the hotel on that date.

3. Based on the evidence presented at trial, the Court finds as a matter of fact that the value of the hotel for purposes of assessment of ad valorem taxes on January 1, 1998, was substantially less than \$2,500,000. In particular, the Court finds credible the unrebutted testimony of the Debtor's principal that the hotel had a value in the range of \$1,600,000 to \$2,150,000 at that time. This evidence alone is sufficient to establish that the hotel was worth less than \$2,500,000, which is all that is required for Heartwood to establish the amount of its claim. Indeed, it is more likely than not that the hotel was worth approximately \$1,625,000 in 1998.

4. The amount of tax, interest, and penalties owed on March 18, 1999, therefore, is properly determined based on a valuation of the hotel as of January 1, 1998, at \$2,500,000. At the conclusion of the trial, Heartwood and DeKalb County agreed that the amount due on March 18, 1999, with regard to 1998 ad valorem taxes (including the principal amount of the tax, penalties, interest, and fees) based on a value for the hotel of \$2,500,000 is \$40,695.93. The Court concludes, therefore, as a matter of law, that the proper tax liability due on March 18, 1999, determined in accordance with 11 U.S.C. § 505(a), was \$40,695.93, the allowed amount of Heartwood's claim (plus interest) in this proceeding in accordance with the stipulation between Heartwood and the Debtor approved by the Court.

5. The Court finds, as a matter of fact and as stipulated by the parties, that Heartwood paid \$100,549 to DeKalb County for the tax claim on March 18, 1999.

6. As stated above, the Court has concluded that Heartwood is entitled to recover from DeKalb County, under the principle of unjust enrichment, the difference between what it paid for the tax claim and the allowable amount of the tax claim under 11 U.S.C. § 505(a) based on a proper assessment of the value of the hotel. The Court concludes, therefore, as a matter of law, that Heartwood is entitled to judgment against DeKalb County in the amount of \$59,853.07, being the difference between what Heartwood paid (\$100,549) and the proper amount of the tax determined in accordance with § 505(a) (\$40,695.93).

7. In accordance with the foregoing findings of fact and conclusions of law, Heartwood is entitled to entry of judgment against DeKalb County in the amount of \$59,853.07, plus post-judgment interest and costs.

Based on the proposed findings of fact and conclusions of law set forth above, this Court

proposes that the District Court, after consideration and de novo review of them: (1) conclude that it has subject matter jurisdiction of Heartwood's third-party claim that it should properly exercise; (2) grant Heartwood's motion for partial summary judgment against DeKalb County; (3) deny DeKalb County's motion for summary judgment against Heartwood; (4) deny DeKalb County's motion at trial for judgment as a matter of law pursuant to FED. R. CIV. P. 52(a); (5) accept this Court's findings of fact and conclusions of law as set forth herein; and (6) enter judgment in favor of Heartwood and against DeKalb County in the amount of \$59,853.07, plus post-judgment interest and costs.

The Court submits the foregoing as proposed findings of fact and conclusions of law to the District Court in accordance with 28 U.S.C. § 157(c)(1). The Clerk is directed to file same and mail copies to counsel for the parties in accordance with FED. R. BANKR. P. 9033.

This 27th day of February, 2007.



PAUL W. BONAPFEL
UNITED STATES BANKRUPTCY JUDGE